

FOCUS ON CRIMINAL LAW

COMMENTARY: fighting money laundering requires more than constitutional arguments

Greg DelBigio thinks that lawyers cannot simply argue that money laundering laws do not apply to them on constitutional grounds and stop the discussion there.

By Greg DelBigio

Criminal law, the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, law society rules and standards of professional conduct all dictate that lawyers concern themselves with money laundering. Not only are lawyers increasingly being called upon to advise a number of industries about compliance, lawyers are required to ensure that their own practices abide by all applicable laws and practice standards.

In October, the Standing Senate Committee on Banking, Trade and Commerce released its review of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* in a report entitled "Stemming the Flow of Illicit Money: A Priority for Canada". Under the section devoted to the

legal profession, the report cites submissions which strongly suggest that the exclusion of lawyers from the application of the reporting requirements is an unwarranted gap. For example, the report cites the RCMP as stating that "the exclusion of the legal profession poses a significant gap in Canada's regime... Anyone, including lawyers, who acts as a financial intermediary must accept responsibility to ensure (he or she is) not moving criminal or terrorist proceeds." Similarly, the report cites that Canadian General Accountants Association of Canada as stating that the "biggest mistake" with the Act was "when the lawyers won the right not to be included".

It is correct that lawyers "won the right not to be included", how-

ever, that right was won on the basis that the legislation that included lawyers was challenged on constitutional grounds. In granting injunctive relief the court in *Law Society of British Columbia v. Canada (Attorney General)* [2001] B.C.J. No. 2420 affirmed the constitutional importance of solicitor-client privilege and that an independent Bar is necessary to the proper administration of justice. The court held (at para.84) that "the petitioners (as well as lawyers and clients, and indeed the administration of justice) may suffer irreparable harm unless lawyers are exempted from reporting suspicious transactions pending a determination of the constitutional issues." This was affirmed by the British Columbia Court of Appeal ([2002] B.C.J.

No. 130). It is therefore curious, if not incorrect, to characterize the exemption that was granted to lawyers as a "mistake" because the exemption was granted on the basis of existing constitutional principles.

Nonetheless, lawyers should be concerned about the submissions made by the RCMP and the accountants association. Lawyers should also be concerned that while the Senate report acknowledges the "constitutional realities within Canada and solicitor-client privilege" the report concludes that "public interest requires that means be found by which legislative obligations would apply to the legal profession while recognizing the principles of solicitor-client privilege."

It is a fact that money laundering is a problem and that a variety of laws are required and justified to address the problem. There is also a belief that money laundering will, in some instances, be accomplished through lawyers who participate either knowingly or unknowingly in a money laundering scheme.

It is therefore not sufficient for lawyers to answer to their critics that the profession is exempt from the money laundering laws on constitutional grounds and that nothing more is required. Indeed, that is not so because lawyers are subject to laws and practice standards relating to money laundering and the proceeds of crime beyond those from which the courts have granted exemption. However, more is required to maintain the public's trust in the profession and in the fair and proper administration of justice.

First, it is necessary for both the profession and the general public to understand that lawyers are, and always have been, subject to the provisions of the *Criminal Code* relating to the proceeds of crime, and lawyers who run afoul of the *Criminal Code* provisions are subject to criminal prosecution. The criminal law prohibits the laundering of proceeds of crime, the possession of property obtained by crime and a variety of actions in relation to terrorist groups

see CONDUCT p. 16

Extradition hearings get radical treatment at the appeal and trial level

By Richard C.C. Peck and Eric V. Gottardi

In two recent cases, *U.S.A. v. Ferras* [2006] S.C.J. No. 33; and *United Mexican States v. Ortega*, [2006] S.C.J. No. 34, the Supreme Court of Canada was asked to consider whether the new evidentiary regime in the *Extradition Act*, S.C. 1999, c. 18 was unconstitutional. Shortly, after the court decided this issue, Justice Anne Molloy handed down her decision in *U.S.A. v. Tollman*, [2006] O.J. No. 3672 (Sup. Ct. Jus.). While the *Tollman* decision did not refer directly to the decision in *Ferras*, Justice Molloy made several interesting rulings that appear to be entirely consistent with the new approach to extradition endorsed by the Supreme Court in *Ferras* and *Ortega*.

The appellants in the *Ferras* appeals argued that the "record of

the case" mode of extradition did not pass constitutional muster because it allowed for the possibility that a person might be extradited on inherently unreliable evidence. The appellants in the *Ortega* appeals argued that the "treaty mode" was unconstitutional because it did not contain even the minimal safeguards present in the "record of the case" mode, in particular a requirement that the requesting state certify that the evidence is available for trial. While the Supreme Court of Canada upheld the constitutionality of ss. 32(1)(a), (b), (c) and 33 of the Act, the court did recognize an increased discretion on the part of the extradition judge to refuse to extradite a person where the evidence is "manifestly unreliable". In doing so, the court modified the *Shepard* test and its application in the context of extradition hearings: a legal threshold which had remained unchanged for almost 30 years: *United States of America v. Shepard*, [1977] 2 S.C.R. 1067, 30 C.C.C. (2d) 424.

As it broadened the role of the extradition judge, the court also commented on procedural issues that may arise at an extradition hearing in relation to the new sufficiency analysis. The court noted that while certification under s. 33 of the Act raises a presumption of threshold reliability, the person sought can adduce evidence to

impeach the reliability of the foreign state's evidence: [paras. 53-54]. Accordingly, the person sought may now present arguments at the extradition hearing that the foreign evidence is so unreliable that it would be "dangerous or unsafe" for a jury to convict, rendering the evidence insufficient. In undertaking the sufficiency analysis, the extradition judge must assess the strength of the case as a whole, including any evidence tendered by the person sought. In the course of that analysis, the extradition judge can engage in a limited weighing of the evidence, a discretion traditionally denied extradition judges.

While the recent constitutional challenge to the *Extradition Act* answered some questions about how the Canadian extradition regime should work, it may have opened the door to even more questions. The person sought may now challenge the reliability of foreign evidence. The extradition judge can now engage in a limited weighing of the evidence to determine if the evidence is available and sufficiently reliable to justify committal. There are some unanswered questions in the judgment. For example, can the extradition judge now consider foreign law in his or her assessment of the facts and the overall sufficiency of the case? Similarly, in assessing the sufficiency of the evidence where

the credibility of certain witnesses is in issue, will the extradition judge now be entitled to hear witnesses and provide the person sought with an opportunity to cross-examine? These questions remain unanswered. The decision in *Ferras* and *Ortega* may open the door to numerous evidentiary challenges by persons sought for foreign prosecutions. Only time will reveal the ultimate impact of this decision.

Some of these questions were recently addressed in a decision of the Ontario Superior Court in *U.S.A. v. Tollman*, [2006] O.J. No. 3672 (Sup.Ct.Jus.). Justice Molloy stayed the extradition proceedings as a result of abusive conduct by American and Canadian authorities. The court held that Canadian immigration processes had been manipulated by the American prosecutor in an attempt to get a U.K. resident, temporarily present in Canada, into U.S. custody to face charges without the safeguards of an extradition proceeding. This type of conduct has been referred to, colloquially, as "disguised extradition". Further, efforts were made to keep the fugitive in a harsh prison setting, away from his family, friends and community, in order to pressure him into abandoning his rights. After those attempts failed, the U.S. finally commenced extradition proceedings.

Perhaps of even more significance than the ultimate stay of proceedings, were some of Justice Molloy's procedural rulings. First and foremost, Justice Molloy held that a hearing in relation to an alleged abuse of process is dif-

ferent in scope and purpose from an extradition hearing. She held that to properly hear an abuse motion, the judge must assess all of the evidence and make findings of fact. She noted that in some circumstances, where there is an "air of reality" to the allegations of abuse and where all of the direct evidence is within the knowledge of another person, a judge might order the cross-examination of a person located outside the jurisdiction.

As such, the *Tollman* decision, including Justice Molloy's preliminary rulings, is an interesting case. In casting the abuse of process hearing as a different but related animal to an extradition committal hearing, Justice Molloy has been able to consider whether a Canadian extradition court can order the cross-examination of certain persons, including those outside the jurisdiction if necessary. Similarly, Justice Molloy suggests that a Canadian court can order a party living outside the jurisdiction to produce documents to the other party. These are revolutionary concepts in the extradition context. If the decision in *Tollman* is followed, and, given the recent Supreme Court of Canada decision in *U.S.A. v. Ferras* and *United Mexican States v. Ortega*, it should be, the face of extradition hearings could change dramatically.

Richard C.C. Peck is a barrister in Vancouver and was counsel on *United Mexican States v. Ortega*. Eric V. Gottardi is an associate at Peck and Company, and was co-counsel on *United Mexican States v. Ortega*.

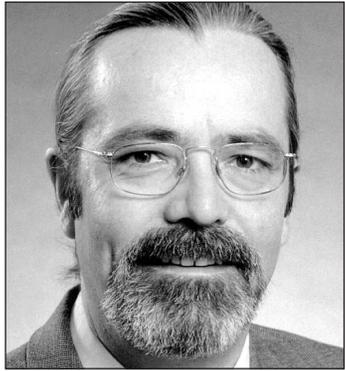


Richard C.C. Peck

CRIMINAL LAW

Not Criminally Responsible Review Board gets strong backing from SCC

By Glen Luther



This spring, in *Mazzei v. British Columbia* [2006] S.C.J. No. 7, the Supreme Court of Canada once again turned its attention to (Not

Criminally Responsible) Review Board powers. The court was faced with a refusal by the Provincial Director of a B.C. hospital to implement the recommendations of the NCR Review Board relating to the treatment plans and “culturally appropriate” treatment for Mazzei, an NCR aboriginal patient. In sum the court held that while the Board had no power to direct treatment, it did have the power to supervise treatment, and to manage treatment plans.

The decision thus forcefully backed the Review Board’s powers to direct certain steps to be taken to ensure suitable treatment was

provided by the Provincial Mental Health system to those found NCR pursuant to the *Criminal Code*. Previously the court had held that the “inquisitorial” nature of the Review Board process requires the Boards to seek out the evidence needed to determine whether a NCR patient poses a “significant risk to the safety of the public.” In *R. v. Winko*, [1999] 2 S.C.R. 625, the court was clear the patient had no onus to establish s/he was no longer a danger to society but rather that, unless the Board had evidence and was of the view that the offender represents such a risk, the offender is entitled to be discharged absolutely from the Review Board’s supervision. The court stressed that the Review Boards had to provide a fair process and their decisions needed to ensure an offender’s continued detention was the least restrictive alternative commensurate with public safety.

The court also has shown a distinct preference to NCR verdicts over common law automatism verdicts when it created a presumption in favour of disease of the mind over so-called non-insane automatism. While the decision in *R. v. Stone*, [1999] 2 S.C.R. 290, has been severely criticized and held by the court itself to have over-stated the evidential burden on an accused (in *R. v. Fontaine*, [2004] S.C.J. No. 23) the core decision in *Stone* relative to the burden of proof being upon the accused remains intact. Nonetheless, it appears that as the Review Board process evolves that lawyers may want to consider the use of

the NCR defence where hitherto they were hesitant to, given the great uncertainty of the period of detention that was to follow. On the other hand, as the Review process is by its nature permanent in the case of a patient who continues to represent a significant risk to society, it appears that the NCR verdict may in many cases represent a suitable alternative to a guilty verdict.

This summer in Saskatchewan, following the high profile abduction of two young boys, several local newspaper editors were seemingly horrified when the alleged offender’s former counsel suggested that he suffers from a disease of the mind and should be found NCR. This media reaction reflects a misunderstanding of the controls in place to manage NCR accused. I, for one, would suggest that a NCR verdict may indeed be the best and safest verdict possible in a such a case as the offender would then be held under the Review Board’s supervision on a permanent basis or at least until it was clear he no longer poses a risk to the public.

In related developments Parliament enacted in the spring of 2005 a new regime to deal with the case of the permanently unfit offender in the aftermath of the Supreme Court’s decision in *R. v. Demers* [2004] S.C.J. No. 43, which struck down parts of the “unfit to stand trial” regime in those cases where an accused had no reasonable prospect of ever being fit. In *Bill C-10* Parliament responded although it did not fully implement the findings of the court in *Demers*. In the new s. 672.851 only a court can stay such charges and only where, in addition to those criteria mandated by *Demers*, the court is also of the view that it is in the “interests of the administration of justice” to do

so.

Meanwhile in Ontario, it would appear there will be continued litigation concerning the overstretched mental health system, as those ordered to be assessed are not being transferred in a timely way into the mental health system but rather, it appears, are being warehoused in jails until beds open up. Justice Richard Schneider held in April 2006 that the detention of an accused in the Toronto Jail when he had been ordered to be assessed in the Centre for Addiction and Mental Health was unlawful and said, *inter alia*: “[i]t is obviously perverse and inexcusable in our civilized society that we find ourselves in a system which jails mentally disordered individuals who are in need of assessment or treatment.” (*R. v. Rosete*, 2006 ONCJ 141, at para. 11). See also: *R. v. Pinet* [2006] O.J. No. 678, *Orru v. Penetanguishene Mental Health Centre*, [2004] O.J. No. 5203 and *R. v. Hussein*, [2004] O.J. No. 459.

The need for an increased number of beds in mental institutions and for more treatment programmes seems obvious and yet political will is lacking to remedy the situation. Lawyers and courts will continue to be challenged by the shortage of beds and programmes. It also seems likely that struggles between the courts and review boards on the one hand, with those administering the mental health and correction systems on the other, will continue. Continued vigilance by those in the legal system in advocating for those in need of treatment and assessment is a necessity.

Glen Luther teaches *Criminal Law, Criminal Procedure, Evidence and Law and Psychiatry* at the College of Law, University of Saskatchewan.

Lawyers must abide by rules

CONDUCT

—continued from p. 15—

including the criminalization of dealing with property owned or controlled by a terrorist group or the facilitating of transactions in respect of that property. There is no gap in the application of criminal law.

Secondly, law society rules and codes of professional conduct require that lawyers maintain the integrity of the profession and the law. (see for example Chapter xv of the CBA Code of Professional Conduct) Lawyers must abide by these standards and the standards include a prohibition upon counselling, encouraging or assisting anyone to act in manner that is contrary to the law. There is, therefore, no gap in this respect.

This does not mean that there is

nothing more to be done. Lawyers must be constantly vigilant to ensure that they do not become unwitting dupes in a money laundering scheme. Lawyers must, therefore, take steps to ensure that they know their clients and that they have an accurate and comprehensive understanding of the true nature of any transaction that they have been retained to facilitate. It is not enough for a lawyer to claim that he or she did not know the true identity of a client or the true nature or purpose of a particular transaction. Lawyers must take positive steps to ensure that their actions comply with law and all professional standards.

Moreover, lawyers must be vigilant to ensure that their practice standards continue to evolve to reflect the growing concern with money laundering.

Public trust in the legal profession and the administration of justice will be maintained only if lawyers contribute to, and are seen to contribute to, efforts to combat money laundering. Equally, however, public trust in the legal profession and the administration of justice can only exist if the independence of the Bar, and the privilege covered by the solicitor-client relationship are zealously guarded. The independence of the Bar and the protection of solicitor-client privilege are not gaps in the administration of justice. Instead, it is the very fabric of the fair and proper administration of justice and it is upon that basis, and only upon that basis, that efforts to combat money laundering can be made.

Greg DelBigio is a practising criminal lawyer in Vancouver and adjunct professor at the faculty of law at UBC.

Research Solutions

Quicklaw™

LexisNexis®
Criminal Law NetLetters™
Makes your research current...

Keeping up to date on emerging legal issues and developments in criminal law is an essential part of your legal practice. Accessible through the new LexisNexis® Quicklaw™ service, every criminal law NetLetter™ is created for busy professionals who need access to information that is:

- **Precise** — Practical arrangement of subtopic with shorter, more concise case summaries, focused directly on the topic area of the NetLetter — zero in on relevant content quickly and efficiently.
- **Complete** — Get full-text coverage of all significant Canadian court decisions and decisions from higher courts, from the most current and archived sources — ready to add value to your research.
- **Convenient** — Schedule your searches to run automatically any time you choose with email alerts — stay on top of your searches and the news stories that matter to you.

For more information about NetLetter services on Quicklaw, visit www.lexisnexis.ca/newquicklaw or call 1-800-255-5174.

TOTAL PRACTICE SOLUTIONS
 Client Development Research Solutions Practice Management Litigation Services

LexisNexis®

LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under licence. Quicklaw, NetLetters, and NetLetter are trademarks of LexisNexis Canada Inc. © 2006 LexisNexis Canada Inc. All rights reserved.